FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE OF ARIZONA,
PETITIONER,

-vs-

WILLIAM LEE BRANHAM,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTION PRESENTED FOR REVIEW

Did the Arizona Court of Appeals err, as a matter of federal constitutional law, in holding that an arresting officer, who has stopped a driver for a traffic violation, is not justified in conducting a *restricted or limited* search for proof of ownership of the vehicle unless the driver's failure to produce proof of ownership is coupled with other factors giving rise to probable cause that the vehicle is stolen or involved in some other criminal activity?

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OPINION BELOW

On December 23, 1997, the Arizona Court of Appeals issued its published opinion reversing and remanding the trial court's ruling denying Respondent's motion to suppress evidence. A copy of the Arizona Court of Appeals' opinion is at Appendix A. The Arizona Supreme Court denied review of Petitioner's petition for review. A copy of the order denying the petition for review is at Appendix B. A copy of the Arizona Court of Appeals' order and mandate reversing and remanding is at Appendix C.

STATEMENT OF JURISDICTION

Petitioners respectfully request that a writ of certiorari issue to review the decision of the Arizona Court of Appeals' holding that police officers are not justified in conducting a limited search of a vehicle for proof of registration unless the search is supported by probable cause; that is failure to provide registration coupled with other factors providing probable cause that the car is stolen or involved in criminal activity. (Appendix A.) The Arizona Court of Appeals issued its opinion on December 23, 1997. The Arizona Supreme Court denied the Petitioners' petition for review on March 17, 1998. (Appendix B.) Petitioners timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254; and Supreme Court Rule 10.1.

PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Untied States Constitution provides, in pertinent part:

No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Procedural History of the Case

On April 12, 1996, the State of Arizona charged Respondent by information with possession of dangerous drugs, a class 4 felony. Respondent filed a motion to suppress the evidence, alleging that the evidence produced was the result of an illegal search of Respondent's vehicle in violation of his constitutional rights. At the conclusion of the hearing on the motion to suppress, the trial court denied the motion, and made the following findings:

> It seems to me that if I went and stole a car and then got stopped for speeding while driving that car and the police officer asked me for driver's license, registration and insurance, I might give him my driver's license, but I wouldn't show him the registration and insurance because it's going to show somebody else's names [sic] that I've never heard of before. Therefore, the rule of law that says a police officer can conduct a limited search for the purpose of finding evidence of registration is reasonable, and it appears that that's exactly what Officer Johnson did in this case. I find no abuse of that process.

After the trial court denied the motion to suppress, the case proceeded to jury trial.[1] The jurors returned a guilty verdict for possession of dangerous drugs. The trial court placed Respondent on three years probation.

On appeal, Respondent challenged the legality of the search of the automobile, and the admissibility of the evidence obtained during the search. On December 23, 1997, the Arizona Court of Appeals held that the search was not supported by probable cause under the automobile exception and reversed Respondent's conviction. The court of appeals remanded to the trial court for a determination of whether a valid consent justified the search.

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1. Respondent's first trial ended in a mistrial because the jurors were unable to reach a verdict.

Petitioners petitioned the Arizona Supreme Court for review. Petitioners presented the following issue for review:

> Did the Arizona Court of Appeals wrongly hold that failure to provide valid registration as required by [Arizona statute] is insufficient alone to justify a limited police search for the registration in areas in which such registration may be kept?[2]

Petitioners further argued that this case was similar in nature to the case of *New York v. Class*, 475 U.S. 106 (1986), where this Court concluded that "a demand to inspect the VIN, *like a demand to see license and registration papers*, is within the scope of police authority pursuant to a traffic violation stop." 475 U.S. at 115. The Court balanced the nature of the intrusion against the governmental interests used to justify the intrusion and concluded that the search was permissible because of the importance of highway and officer safety and because "[t]he search was focused in its objective and no more intrusive than necessary to fulfill that objective." *Id.* at 118. On March 17, 1998, the Arizona Supreme Court denied review.

Facts of the Case

At the suppression hearing, Officer Lane Johnson testified that while on patrol at 4:45 a.m., he noticed a 1983 blue Pontiac Firebird speeding. Officer Johnson stopped the Firebird and contacted the driver, Respondent. Respondent identified himself to Officer Johnson with his Arizona driver's license. Officer Johnson asked Respondent for the vehicle registration and proof of insurance. Officer Johnson twice instructed Respondent to search for the registration, and after two searches through the car, Respondent was unable to provide registration or proof of insurance. Officer Johnson asked Respondent and his wife to step out of the car so he could "help him out" and look for it. Respondent answered, "Okay."

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2. Arizona Revised Statute § 13-2158(C) provides:

> The registration card shall be carried at all times in the driver's compartment of the vehicle for which it is issued. The registration card is subject to inspection by the director, members of the highway patrol or any peace officer.

Officer Johnson explained that the particular model of Firebird involved does not have a glove box but a folding pocket, and a center console with the gearshift. Officer Johnson further explained that often when the registration is not kept in the side pocket, it is kept inside the center console. In Respondent's car, there were papers stuffed into a broken section of the gearshift box right in front of the console. Officer Johnson looked through the papers, but did not find the registration. However, in the hollow portion of the broken gearbox, he noticed several vials and containers containing a brown crystal substance, plastic scales, and other drug paraphernalia. At that point, Officer Johnson seized the items and read Respondent his *Miranda* rights. Respondent told Officer Johnson that he did not know what kind of drugs were in the vials and containers, that he did not know to whom they belonged, and that he did not want to talk about it. Tests later proved that the substance was 11 grams of methamphetamine.

REASON WHY THE WRIT SHOULD ISSUE

This Court should grant the petition for writ of certiorari because the Arizona Court of Appeals has decided an important federal question in a way that conflicts with the decisions of this Court, of federal circuit courts of appeal, and other states that recognize that if an operator of a vehicle is stopped for a traffic violation and is unable to produce registration, it is not unreasonable for the officer to enter the vehicle to conduct a *limited* search for registration after making reasonable attempts to procure registration, including an inquiry as to the whereabouts of the registration prior to entry. In particular, the Arizona Court of Appeals has adopted the minority position that the inability to produce a registration certificate will justify a limited search of the vehicle *only* in those limited circumstances where other evidence coupled with the failure to produce registration provides probable cause to believe that the car is stolen or involved in some other criminal activity. Arizona and its minority confuse the limited search exception with a full-blown probable cause search under the automobile exception.

The position that police officers are not justified in conducting a limited search for registration after failure to produce registration conflicts with the principles set out in *New York v. Class*, 475 U.S. 106, 115-16 (1986); *United States v. Miller*, 84 F.3d 1244, 1251 (10th Cir. 1996); *Jackson v. Superior Court*, 142 Cal.Rptr. 299, 302–03 (Cal. 1977) (officer may enter a vehicle to check on registration after first inquiring as to location of registration slip before entering to obtain it); *State v. Boykins*, 232 A.2d 141, 143 (N.J. 1967) (failure to produce proof of registration justified officer's search for evidence of ownership)[3]; *People v. Reyes*, 499 N.Y.S.2d 321, 323 (N.Y. Sup. Ct. 1983) (failure to comply with rules governing ownership of automobiles diminished expectation of privacy and gave police a reasonable basis to further inspect the vehicle); *State v. Byrd*, 209 S.E.2d 516, 517 (N.C. App. 1974) ("[a] traffic violation as such will justify a search for things related to it. So . . . if the operator is unable to produce proof of registration, the officer may search the car for evidence of ownership. . . ."); *State v. Halstead*, 414 A.2d 1138, 1149 n.14 (R.I.

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3. *Boykins* is the landmark case setting out the majority position. This case was later refined in *State v. Patino*, 414 A.2d 1327 (1980), holding that the search for evidence of ownership must be "confined to the glove compartment or other area where a registration might normally be kept in a vehicle. . . ."

1980) (Fourth Amendment rights not violated when police look for evidence of ownership following failure to provide proof of registration).

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Chadwick*, 433 U.S. 1, 7 (1977). The Fourth Amendment does not require that every search be made pursuant to a warrant. *South Dakota v. Opperman*, 428 U.S. 364, 372–73 (1976) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 509–10 (1971) (Black, J., concurring and dissenting)). "The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances." *Opperman*, 428 U.S. at 372–73; *see also Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)) (the purpose of the Fourth Amendment is to impose standard of reasonableness upon the exercise of government intrusion). The reasonableness of a search and seizure depends on the facts and circumstances of each case. *Cooper v. California*, 386 U.S. 58, 59 (1967). The permissibility of a particular government practice is judged by balancing the intrusion of Fourth Amendment interests against its promotion of legitimate government interests. *United States v. Ramsey*, 431 U.S. 606, 616–19 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976).

"A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile." *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). However, a state's intrusion into a particular area, whether in an automobile or elsewhere, does not result in a Fourth Amendment violation unless the area is one in which there is a "constitutionally protected reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). It so happens that the physical characteristics of an automobile and its use result in a *lessened expectation of privacy* therein. *Class*, 475 U.S. at 112.

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.

Cardwell v. Lewis, 417 U.S. 583, 590 (1974). In addition, automobiles are justifiably the subject of pervasive regulation by the State. *Opperman*, 428 U.S. at 368.

> States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed. Automobile licenses are issued periodically to evidence that the drivers holding them are sufficiently familiar with the rules of the road and are physically qualified to operate a motor vehicle. The registration requirement and, more pointedly, the related annual inspection requirement . . . are designed to keep dangerous automobiles off the road. Unquestionably, these provisions, properly administered, are essential elements in a highway safety program.

Prouse, 440 U.S. at 658. Thus, a motorist must assume that such regulation will on occasion require the state to determine the vehicle identification number (VIN), licenses, and registration of the vehicle, and the individual's reasonable expectation of privacy in those areas where these items might be found is diminished. *See Class*, 475 U.S. at 113; *Prouse*, 440 U.S. at 659; *Cardwell*, 417 U.S. at 588–90.

> The foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day; and on these occasions, licenses and registration papers are subject to inspection and drivers without them will be ascertained.

Prouse, 440 U.S. at 659.

Thus, not every traffic violation will justify a search of every part of the vehicle. However, a traffic violation as such will justify a search for things related to it. *Class*, 475 U.S. at 114–16; *Boykins*, 232 A.2d at 143; *Byrd*, 209 S.E.2d at 517. The fact that a driver of a vehicle cannot immediately produce the vehicle's registration or proof of insurance supports a *reasonable suspicion* that the vehicle is stolen. *Id.* That suspicion justifies a police officer in conducting a limited warrantless search of areas in the vehicle where such papers might normally be kept

by an owner. This is not contrary to the Fourth Amendment of the United States Constitution and such exercise demonstrates a valid exercise of state police power in furtherance of the state's legitimate interest. *Id.* Under the circumstances of this case, the search was reasonable and justified.

This Court set out the crucial test for judging the constitutionality of limited intrusions in *United States v. Sharpe*, 470 U.S. 675 (1985). The test is "[w]hether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain [or search] the defendant." *Sharpe*, 470 U.S. at 686; *see also United States v. Place*, 462 U.S. 696, 709 (1983) ("in assessing the effect of the length of detention, we take into account whether the police diligently pursued their investigation"); *Florida v. Royer*, 460 U.S. 491, 500 (1983) ("The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."); *Michigan v. Summers*, 452 U.S. 692, 701 n.14 (1981) ("[t]he reasonableness of a detention may be determined in part by 'whether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon.'") (quoting 3 W. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2 at 40 (1978)). The "diligence and necessary" test for determining the constitutionality of a *Terry*-type[4] police intrusion was reiterated in *Class* and applied to searches for a VIN, registration papers, license, and proof of insurance. 475 U.S. at 115, 18–19. In *Class*, this Court stated that a driver does not have a reasonable expectation of privacy in a VIN, especially when a driver has committed a traffic violation. 475 U.S. at 113–14. The court further concluded that "a demand to inspect the VIN, like a demand to see license and registration papers, is within the scope of police authority pursuant to a traffic violation stop." *Id.* at 115. The Court balanced the nature of the intrusion against the governmental interests that justified the intrusion and concluded that the search was permissible because of the importance of highway and officer safety and because "[t]he search was focused in its objective and no more intrusive than necessary to fulfill that objective." *Id.* as 118. In sum, the Court held:

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4. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968) (in justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, justifiably warrant that intrusion).

> that this search was sufficiently unintrusive to be constitutionally permissible in light of the lack of a reasonable expectation of privacy in the VIN and the fact that the officers observed respondent commit two traffic violations. Any other conclusion would expose police officers to potentially grave risks without significantly reducing the intrusiveness of the ultimate conduct—viewing the VIN—which, as we have said, the officers were entitled to do as part of an undoubtedly justified traffic stop.

Id. at 119.

Arizona and its minority require that a limited search for proof of ownership must be supported by probable cause in all circumstances. The minority view holds that a limited search for registration papers as part of a justified traffic stop is reasonable *only* when the operator's failure to produce registration coupled with some other factors gives rise to probable cause that the vehicle is stolen or involved in some other criminal activity. *State v. Branham*, 952 P.2d 332, 336 (Ariz. 1997); *State v. Moore*, 659 P.2d 70 (Haw. 1983) (entry into the vehicle was necessary to inspect the VIN; because the entry was not justified by probable cause or reasonable suspicion that the vehicle was involved with a crime, the entry was unlawful); *People v. Judge of Seventh Dist. Court*, 222 N.W.2d 778, 781 (Mich. Ct. App. 1970) (where the officer did not have probable cause that the car was stolen, search could not be validated even though the driver had been arrested for nonpossession of a registration certificate); *Taylor v. State*, 421 S.W.2d 403, 406 (Tex.Cr.App. 1967) (requiring failure to provide proof of registration coupled with other factors giving rise to probable cause before a search for registration is justified).

However, failure to produce registration papers combined with other factors giving rise to probable cause to search is not the test for determining whether a limited search for registration papers is justified. Arizona and its minority have misconstrued the reasonableness test and the requirements for a *restricted or limited* search following a traffic violation and failure to produce evidence of ownership. It remains that it is not unreasonable for a law enforcement officer that has stopped a driver for a traffic violation, who is unlicensed or unable to produce registration, to conduct a limited search for proof of ownership. *Class*, 475 U.S. at 114–16; *Prouse*, 440 at 662–63. This search is reasonable under the Fourth Amendment.

Therefore, it is clear that a driver's inability to produce registration, gives rise to reasonable suspicion that the car is stolen. *Byrd*, 209 S.E.2d at 517; *Boykins*, 232 A.2d at 143. This suspicion justifies entry into the vehicle to search for proof of ownership in those areas where it might be found. The minority view that probable cause is necessary before a *limited* search for registration papers is justified is contrary to the decisions of this Court, federal circuit courts of appeal, and other states. *See Class*, 475 U.S. at 118–19; *Miller*, 84 F.3d at 1251; *Jackson*, 142 Cal.Rptr. at 302–03; *Boykins*, 232 A.2d at 143; *Reyes*, 499 N.Y.S.2d at 323; *Byrd*, 209 S.E.2d at 517; *Halstead*, 414 A.2d at 1149 n.14.

"The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (quoting *Martinez-Fuerte*, 428 U.S. at 544). If this Court permits the minority standard adopted by the Arizona Court of Appeals to stand, which requires officers on the street to assess other factors indicating probable cause that the vehicle in question was either stolen or involved in other criminal activity, then the long-standing clear rule of law that has become routine practice will be altered with unworkable ambiguity. An officer confronted with a non-compliant motorist is alone and without the ability to call a magistrate. Such an officer has a reasonable belief to search for the registration solely upon the failure of a motorist to provide it upon request.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioners respectfully request this Court grant the petition for writ of certiorari to resolve the conflict between the minority view adopted by Arizona that probable cause is required before conducting a *limited* search for registration papers and the majority view that failure to produce registration creates reasonable suspicion that the vehicle may be stolen and justifies a limited search of the vehicle in those areas where the registration might be found.

Respectfully submitted,

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APPENDICES

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	
	)	1 CA-CR 97-0246
Appellee,	)	
	)	DEPARTMENT A
V.	)	
	)	O P I N I O N
WILLIAM LEE BRANHAM,	)	
	)	Filed 12-23-97
Appellant.	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR 96-90862

The Honorable Cheryl K. Hendrix, Judge

REMANDED WITH INSTRUCTIONS

—

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WEISBERG, Judge

William Lee Branham ("defendant") appeals from his conviction on one count of possession of dangerous drugs. We must decide whether a police officer making a legitimate traffic stop may conduct a limited search for the vehicle registration card based solely on the driver's failure to produce it. Because we hold that such a search is not permissible under the Fourth Amendment, we remand with instructions.

Facts and Procedural History

Officer Johnson stopped defendant for speeding. Upon the officer's request, defendant tendered his driver's license, but indicated that he had recently cleaned out his car and left the vehicle registration at home. After twice instructing defendant to search for the registration, Officer Johnson ordered defendant and his wife to step out of the car so he could search it himself. The officer testified that defendant said "okay."

Officer Johnson later testified that the failure to produce the vehicle registration, by itself, justified his limited search and that he had no other basis for searching the car. He indicated that he conducted similar searches in approximately eighty-five percent of those cases in which a driver could not produce registration.

During his limited search, Officer Johnson found some methamphetamine and drug paraphernalia. Based on this evidence, defendant was charged with possession of dangerous drugs. Defendant filed a motion to suppress, which was denied by the trial court. After his conviction by a jury, defendant timely filed this appeal.

Discussion

Generally, a search without a warrant is per se unreasonable and in violation of the Fourth Amendment. See *State v. Castaneda*, 150 Ariz. 382, 389, 724 P.2d 1, 8 (1986). Several exceptions to the warrant requirement exist, however, and the state argued that two of these applied: the automobile exception and consent.

A. Automobile Exception

When the trial court denied defendant's motion to suppress, it made the following observation:

> It seems to me that if I went and stole a car and then got stopped for speeding while driving that car and the police officer asked me for driver's license, registration and insurance, I might give him my driver's license, but I wouldn't show him the registration and insurance because it's going to show somebody else's names that I've never heard of before. Therefore, the rule of law that says a police officer can conduct a limited search for the purpose of finding evidence of registration is reasonable, and it appears that that's exactly what Officer Johnson did in this case. I find no abuse of process.

The rule of law to which the trial court referred is found in *State v. Taras*, 19 Ariz. App. 7, 504 P.2d 548 (1972). In *Taras*, officers spotted a car parked in a desert area where stolen cars were often abandoned. When they slowly approached the car in a police vehicle, Taras drove off rapidly into the desert without turning on the headlights. The police pursued and, after a short distance, Taras abandoned the car and fled on foot. The officers apprehended Taras after a brief chase. Taras told the officers that the car belonged to him and that the registration was not in it. One of the officers got into the vehicle and searched the dashboard and visor area for the registration, and found some marijuana and drug paraphernalia. *Id.* at 8-9, 504 P.2d at 549-50.

Taras moved to suppress the marijuana and paraphernalia as fruit of an illegal search. The *Taras* court held that the search was reasonable under the circumstances. See *Id.* at 10, 504 P.2d at 552. The court noted that it was obvious that Taras had wished to avoid the police. See *Id.* at 11, 504 P.2d at 553. Furthermore, the car was found in a location known by officers to be a place where stolen cars were abandoned. The officers therefore suspected that the car was stolen, and the court held that "if a driver is unable to produce proof of registration, the officer may conduct a limited search of the car for evidence of automobile ownership." *Id.* This broad language appears to be the presumed rule of law upon which the trial court based its ruling and upon which the officer based his search.

The *Taras* court premised its decision on the automobile exception to the search warrant requirement as articulated in *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970) (search warrant unnecessary where there is probable cause to search automobile stopped on the highway). The United States Supreme Court indicated that, because of the particular mobility of a car, an exception to the general warrant requirement exists so long as

officers have probable cause to believe there is evidence "that the officers are entitled to seize." *Id.* at 48.

In *Taras*, the court specifically listed the facts that supported the officers' belief that the car might have been stolen: (1) the car was parked in an area where stolen cars were typically abandoned, (2) *Taras* tried to elude the police, and (3) Taras could not produce registration of the vehicle. See *Id.* at 10-11, 504 P.2d at 552-53. On its facts, therefore, *Taras* simply applied *Chambers* and held that, under all of the circumstances, including the failure to produce registration, the officers had probable cause to believe that the car was stolen. *Id.*

Other cases have reached the same conclusion on similar facts. See *State v. Acosta*, 166 Ariz. 254, 801 P.2d 489 (App. 1990); *English-Clark v. City of Tucson*, 142 Ariz. 522, 525, 690 P.2d 1235, 1238 (App. 1984). In *Acosta*, the state attempted to justify a search of a car on the basis that the driver failed to produce proof of ownership. See *Id.* at 258, 801 P.2d at 493. But, as in Taras, there were other factors that supported the search, specifically, that the driver did not have a driver's license and that he did not know the name of either the car's owner or the person who had loaned it to him. See *Id.* Considering these facts, this court concluded that the "officer certainly could have a reasonable suspicion that the car was stolen. . . ." *Id.* The determinative fact, again, was whether there was probable cause to believe that the car was stolen.

In *English-Clark*, a police officer observed a truck towing a trailer without turn signals or brake lights. The driver resisted the officer's attempts to stop the truck and, after the truck was finally halted, acted in a disruptive and obscene manner. When the officer approached the truck, he observed a shotgun, shotgun shells, and drugs on the seat. The driver, who could not produce the truck's registration, explained that the truck belonged to his mother. The driver was then placed under arrest for fleeing from a law enforcement vehicle. After searching the truck, the officer found more guns and drugs. The *English-Clark* court cited *Taras* and concluded that all of the facts, including the failure to produce the registration, gave the officer "the articulable facts necessary to justify a search of the truck." *Id.* at 525, 690 P.2d at 1238. Although not expressly set forth, these facts clearly provided probable cause to believe that the truck was stolen and that the persons in the truck illegally possessed drugs and guns.

In each of these cases, there was probable cause to believe that the vehicle was stolen, in part based upon the driver's failure to produce registration. In the instant case, the search was based solely on the driver's failure to produce proof of registration. The officer even testified that he had no reason to believe that defendant's car was stolen and that he did not need such evidence; instead, the search was pursuant to his policy to search most vehicles when the drivers could not produce registration.

Defendant relies on *People v. Superior Court*, 496 P.2d 1205 (Cal. 1972). On facts similar to the instant case, the California trial court granted a motion to suppress and the state appealed. The California Supreme Court analyzed the failure to produce registration as follows:

> It would not be unreasonable for a thief to remove or destroy the registration card of an automobile he has taken; his purpose in so doing might be to prevent the true owner from being traced, to eliminate the discrepancy between the owner's name and his own, or to facilitate substitution of a forged card. . . . [I]t is also true that being a stranger to the vehicle he might not be able to present the card to an officer simply because he did not know where to find it. [496 P.2d at 1210.]

This is the same reasoning that the trial court applied in the instant case to find that the search was justified. But the California Supreme Court went on in its analysis to note that the failure to produce the registration card "could equally well be entirely innocent." *Id.* at 1210. The court provided such examples as when a person renews or transfers registration, requiring its removal from the car, or when a driver might innocently be unable to locate the registration. *Id.* The court concluded that the failure to produce registration, without more, does not provide probable cause to believe that a car has been stolen.

In *State v. Valenzuela*, 121 Ariz. 274, 589 P.2d 1306 (1979), this analysis was applied by the Arizona Supreme Court to another type of search. In that case, an officer searched a person who was standing in a group because the officer had smelled a strong odor of marijuana. The Valenzuela court cited *People v. Superior Court* for the proposition that, because the presence of marijuana odor is equally consistent with innocent behavior on Valenzuela's part (other persons were present who could have possessed the marijuana), the odor, by itself, did not provide probable cause to search him. The court went on to note that additional factors,

specifically Valenzuela's dishonest answers about the contents of his pockets and other facts, in combination with the smell of marijuana, did provide probable cause. *Valenzuela*, 121 Ariz. at 276, 589 P.2d at 1308.

Applying the *Valenzuela* reasoning to the instant case, we reach the same result as the court in *People v. Superior Court*. The failure to produce registration is not a criminal offense. Ariz. Rev. Stat. Ann. § 28-305(F. Supp. 1997) (requiring registration card to be carried in car), § 28-181 (violation of chapter 3 is a civil traffic violation). As a result, the failure to produce registration is equally consistent with innocent behavior. Therefore, such failure, by itself, does not provide probable cause to believe that a car is stolen and does not permit the limited search conducted here.

This decision does not mean that failure to produce registration is irrelevant in all cases. As *People v. Superior Court, Taras, Acosta,* and *English-Clark* all conclude, other facts, in combination with the failure to provide registration, may provide probable cause to believe that a car is stolen, or is involved in some other criminal activity. We hold that because the state did not provide any additional evidence that the vehicle in this case might be stolen or involved in some other criminal activity, the search was not supported by probable cause under the automobile exception.

B. Consent

The state also argues that defendant consented to the search. The record, however, indicates that the trial court did not rule on this fact-intensive question. See *State v. Paredes*, 167 Ariz. 609, 612, 810 P.2d 607, 610 (App. 1991). Because we find that the trial court's basis for denying the motion to suppress was incorrect, we remand the case for consideration of whether the state provided clear and positive evidence that consent to search was freely and voluntarily given. See *Id.*

Conclusion

For the foregoing reasons, we vacate the trial court's order denying defendant's motion to suppress. Notwithstanding, we remand the case for consideration of whether a valid consent justified the search and such other further proceedings as are consistent with this opinion.

Sheldon H. Weisberg, Judge

CONCURRING:

Sarah D. Grant
Presiding Judge

Ruth V. McGregor, Judge

SUPREME COURT

NOEL K. DESSAINT
CLERK OF COURT

STATE OF ARIZONA
402 ARIZONA STATE COURTS BUILDING
1501 West Washington
Phoenix, Arizona 85007-3329

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

March 19, 1998 **Telephone: (602) 542-9396**

RE: STATE OF ARIZONA VS. WILLIAM LEE BRANHAM
Supreme Court No. CR-98-0067-PR
Court of Appeals No. 1 CA-CR 97-0246
Maricopa County No. CR 96-90862

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 17, 1998, in regard to the above-referenced cause:

ORDERED: The State of Arizona's Petition for Review = DENIED.

Justice McGregor did not participate in the determination of this matter.

Record returned to Court of Appeals, Division One, Phoenix, this 19th day of March, 1998

NOEL K. DESSAINT, Clerk

TO:
Hon. Grant Woods, Arizona Attorney General
Attn: Paul J. McMurdie, Esq. and Ginger Jarvis, Esq.
Dean W. Trebesch, Maricopa County Public Defender
Attn: Lawrence S. Matthew, Esq.
William L. Branham
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Lexis-Nexis
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IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

Division 1
Court of Appeals
State of Arizona
Filed: Apr. 9, 1998

GLEN D. CLARK, CLERK

By: K. Scott

STATE OF ARIZONA,	)	1 CA-CR 97-0246
	)	
Appellee,	)	
	)	
v.	)	DEPARTMENT A
	)	
WILLIAM LEE BRANHAM,	)	MARICOPA County
	)	Superior Court
Appellant.	)	No. CR 96-90862
	)	

ORDER AND MANDATE

Grant Woods, The Attorney General
By: Paul J. McMurdie, Chief Counsel, Criminal Appeals Section
Attorneys for Appellee — Phoenix

Dean W. Trebesch, Maricopa County Public Defender
By: Lawrence S. Matthew, Deputy Public Defender
Attorneys for Appellant — Phoenix

The opinion of this Court in the above matter was filed on December 23, 1997.

A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order, dated March 17, 1998, the Arizona Supreme Court denied the petition for review, Supreme Court No. CR 98-0067-PR.

IT IS ORDERED in conformity with the opinion attached hereto.

IT IS FURTHER ORDERED that a certified copy of the foregoing ORDER and MANDATE and a copy of the opinion of the Court were mailed to the Clerk of the Superior Court for MARICOPA County, Arizona, on April 9, 1998. A copy of the ORDER AND MANDATE and a copy of the opinion were mailed to the Honorable Cheryl K. Hendrix, Judge, and a copy of the ORDER and MANDATE was mailed on said day to each party appearing or the attorneys of record; as well as the MARICOPA County Attorney.

IT IS FURTHER ORDERED pursuant to this Court's order of the 11th day of March, 1965, that the Clerk of this Court return to the Clerk of Superior Court, all records, exhibits, and other matters received from said Clerk by this Court in aid of the consideration of this matter.

DATED April 9, 1998.

_____
VICE CHIEF JUDGE

All of the foregoing directives were complied with April 9, 1998.

GLEN D. CLARK, Clerk
By

Karen Scott
Deputy Clerk